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DEPARTMENT OF CHEMISTRY

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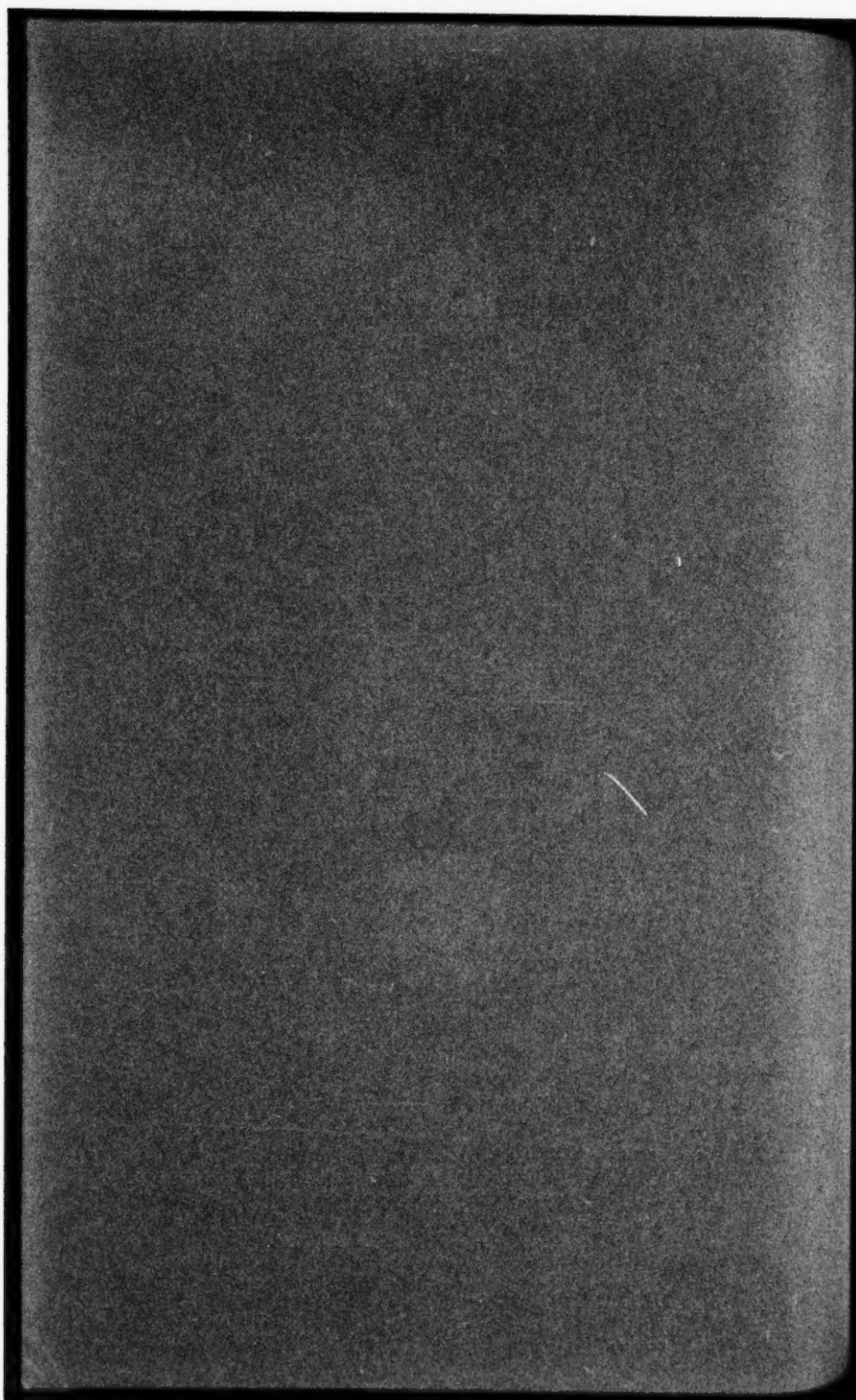
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In the Supreme Court of the United States.

October Term, A. D. 1924

STATE OF ARKANSAS, EX REL., J. S. UTLEY, Attorney General of the State of Arkansas, for the Use and Benefit of Craighead County Arkansas, *Petitioners,*

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY and MISSOURI-PACIFIC RAILROAD COMPANY, *Respondents.*

No. 410

REPLY TO RESPONDENT'S BRIEF ON PETITION FOR CERTIORARI.

Since respondents have raised an entirely new issue and attempted to add new matters to the record by presenting a certified copy of the judgment obtained by the Maccabees against Craighead County, showing its satisfaction of record on April 3, 1924, by the attorneys for the Maccabees, and by asserting that the satisfaction of this judgment in behalf of the Maccabees acts as remittitur

with respect to all their liability for taxes under the mandamus accruing prior to the satisfaction of the judgment, it seems permissible to file a brief in reply to their contention that the present case now presents a "feigned issue" and that the questions presented by us have thus become purely academic.

Since the respondents seek to add new matter to the record, a word of explanation is surely not amiss.

The decision of the State Supreme Court in this case holding that the taxes levied on the assessment made pursuant to the Federal mandamus upon a full value basis for county purposes and a fifty per centum basis for other purposes could not be enforced was rendered during the tax collecting period for the 1923 taxes, collectible from Jan. 1, 1924 to April 10, 1924. The judgment of the Maccabees still remaining unpaid, the 1923 taxes had been levied upon the same kind of assessment as the 1921 and 1922 taxes here sued for.

The railroads having apparently been relieved from the payment of these taxes by the action of the State Supreme Court herein, the other taxpayers of Craighead County who had without

question paid the 1921 and 1922 taxes refused to pay the 1923 taxes levied upon the same basis if the railroads were not going to be made to do so. Complete stagnation in the collection of taxes thus resulted. The collector of revenue had no power to collect taxes except as extended on the tax books. The County Judge of Craighead County could not order the reduction of the county taxes levied upon the full value assessment without running the risk of being in contempt under the Federal mandamus. The assessment had been made as directed by the Federal mandamus and also according to a letter from the Federal Judge. The County Judge could not afford to assume that the District Federal Court would recede from its own order and approve the decision of the State Supreme Court.

In this crises some of the banks and larger taxpayers of the county came to the county's relief by advancing enough money to pay the judgment held by the Maccabees. In exchange for their money they received at par county warrants worth considerably less than their face value in money and unsupported by a Federal mandamus.

The railroads thus seek to avail themselves of a

distressful condition occasioned by their own wrong, as a further reason why they should be upheld in having originally committed that wrong.

If this were an appeal from the judgment of the Federal Court originally granting the mandamus, then the satisfaction of the judgment held by the Maccabees would abate the appeal, by rendering the question academic. See case notes: *Ann. Cas. 1912C, 247*; *5 Ann. Cas. 626*. But this is an appeal from a suit brought by the State to recover taxes due by the respondents under the mandamus during the period of time that the mandamus was actually in force. A satisfaction *by the county* of the judgment of the Maccabees cannot under any conceivable view operate as a satisfaction or discharge *by the railroads* of the amounts of taxes which they should have paid the county in the same manner and to the same extent as was actually done by the other taxpayers of the county while the mandamus was in force.

Respondents cite no cases to that effect but seem to assume that the courts will place a premium on delinquency in payment of taxes by holding that, if a taxpayer can manage to defer the payment of his taxes under a mandamus until the

other taxpayers of the taxing district affected have either paid enough taxes or loaned to the county enough money to enable it to satisfy the judgment against it, he will be excused from payment of his portion of the mandamus burden. Such cannot be the law if it is to bear any remote relation either to justice or to the common sense. It would be just as logical to contend that one joint maker of a note can successfully resist a suit by the other joint maker for contribution on the theory that the note was discharged and all liability terminated when the plaintiff joint maker paid the entire obligation out of his individual funds.

The Supreme Court of Arkansas has held otherwise. Thus, in *Thibault v. McHaney*, (1917) 127 Ark. 1, 21, where taxpayers in an improvement district pursued the same course as that followed by respondents here, the court said;

“Now these recalcitrant taxpayers say they should not be permitted to profit by the fact that they held back and refused to pay until the other property owners paid substantially enough to discharge the joint obligations. The position is wholly untenable, and the doctrine invoked has no application,

which is based entirely upon the theory of estoppel—that one who pays money voluntarily, and with full knowledge of the facts will not be heard to assert the right to recover it back. In this instance the property owners undoubtedly paid voluntarily with knowledge of the facts, but, as already stated, they paid upon the implied assurance that all of the taxpayers would be required to respond in like proportion, and that any sum in excess of the amount required to discharge the obligations would be refunded.”

The remission of overdue taxes does not occur even when the taxing law itself has been repealed! Thus, in *State v. Certain Lands*, (1882) 40 Ark. 35, 37, in a proceeding brought under a overdue tax statute, the court said:

“Some of the Acts, under which levies were made for some of the years in question, have been repealed, either expressly or by implication. When the taxes had already become due, as in cases where the lands had been assessed, but payment had not been made, a retrospective operation should not be given to the repealing statutes. It cannot be

supposed that the General Assembly intended to remit those taxes."

Under the existing Arkansas Corporation Overdue Tax Statute nunc pro tunc assessments are made by assessing authorities under the direction of the court for prior years regardless of the repeal of the taxing statute under which the liability accrued.

If the satisfaction of the judgment held by the Maccabees operates to destroy the mandamus *ab initio* so as completely to destroy its effect and operation during the period of time that the judgment remained unsatisfied, then, by parity of reasoning, all taxpayers who paid taxes to the county during that period are entitled to a refund for all taxes paid in excess of that amount that would have been paid if there had been no mandamus. This conclusion is unescapable. Yet this is necessarily the only kind of reasoning that can be employed in favor of the proposition that the satisfaction of the judgment in 1924 operates as a removal of the liability of respondents for the taxes of 1921 and 1922.

The fact that there can be no full value assessment for 1924 or subsequent years on account of

the satisfaction of the Maccabees' judgment does not affect the liability therefor for prior years, but it does bring about the conclusion that, unless the railroads are made to pay their part of the taxes in the present suit, they alone of all the taxpayers of Craighead County will have escaped the burden of the mandamus.

Respectfully submitted,

STATE OF ARKANSAS, EX REL., J. S. UTLEY,
Attorney General of the State of Arkansas,
for the Use and Benefit of Craighead
County, Arkansas,

By J. S. UTLEY, *Attorney General.*

A. P. PATTON and
HORACE SLOAN,
Special Counsel for Craighead County.

Jonesboro, Arkansas
October 1, 1924.